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SUPREME COURT, U.S.

IN THE UNITED STATES SUPREME COURT

STATE ex rel. LAWRENCE
CALVIN WHITTEMORE,

Petitioner-Appellant,

v. Case No. 80-5355

CIRCUIT COURT FOR KENOSHA COUNTY,
HONORABLE BURTON A. SCOTT,
Presiding,

Respondent-Appellee.

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MOTION TO DISMISS FOR LACK OF JURISDICTION

Respondent moves the Court to dismiss this appeal because the Court lacks jurisdiction over the appeal as stated by appellant, Lawrence C. Whittemore.

FACTS

Petitioner-appellant (hereinafter appellant) alleges the following facts in support of his appeal:

That he was sentenced to life imprisonment with a consecutive sentence of fifteen years on August 4, 1977, by Kenosha County (Wisconsin) Circuit Court Judge Burton A. Scott;

That at his trial, Wisconsin Jury Instruction--Criminal 1100 was given (Trial Transcript at 433-41);

That Wis. J I--Criminal 1100 unconstitutionally shifts the burden of proof on the issue of criminal intent, in violation of the decisions of this Court in Mullaney v. Wilbur, 421 U.S. 684 (1975), and Sandstrom v. Montana, 442 U.S. 510 (1979); and

That he raised this issue as the basis of his petition for habeas corpus filed with the Wisconsin Supreme Court on April 9, 1980.

On April 17, 1980, the respondent was notified of appellant's petition but was not ordered to respond by the Wisconsin Supreme Court.

On July 9, 1980, the Wisconsin Supreme Court issued a summary order denying the petition for habeas corpus on the following grounds: "[T]he court conclude[s] that the issue raised has been resolved contrary to the petitioner's position in Muller v. State, 94 Wis. 2d 450, 289 N.W.2d 570 (1980)." State ex rel. Whittemore v. Circuit Court for Kenosha County, No. 80-691-W (Wis. Sup. Ct. July 9, 1980).

This Court may take judicial notice that the only crime for which a sentence of life imprisonment could have been imposed in Wisconsin in 1977 was first degree murder.

Appellant alleges that the Wisconsin Supreme Court, by denying his petition, deliberately violated a federal statute, Title 18 U.S.C. sec. 1581 (1966). This statute forbids peonage; appellant contends that any judge who deliberately violates the Constitution (presumably, as here, while denying a writ of habeas corpus) has violated this statute.

Appellant also invokes 28 U.S.C. 1257(1) (1966) as the basis for thi Court's jurisdiction for his appeal.

ARGUMENT

I. THIS COURT DOES NOT HAVE APPELLATE JURISDICTION OF THIS CASE UNDER 28 U.S.C. SEC. 1257(1) (1966).

A. Service Under A Criminal Sentence Is Not Peonage.

In United States v. Reynolds, 235 U.S. 133 (1914), this Court construed "peonage" as a status or condition of compulsory service based on the indebtedness of the peon to the master. The statute is

addressed to a particular evil, and contains no hint either in its language, history or construction, that it is meant to serve as a means of ingenious postconviction relief for inmates. Relief for those who claim that their criminal custody is in violation of their constitutional rights is provided for in 42 U.S.C. sec. 2254 and sec. 2255 (1973), through petition to the federal court for writ of habeas corpus.

B. The Wisconsin Supreme Court Did Not "Draw Into Question The Validity Of" A Statute Of The United States.

To assume the nearly absurd, even had the Wisconsin Supreme Court deliberately refused to grant appellant's petition although his custody were clearly in violation of the Constitution, and this action were equivalent to placing him in "peonage" for his assumed "debt to society" (the state), at most the Wisconsin Supreme Court would be guilty of a violation of the peonage statute. In no way did the Wisconsin Supreme Court address or "draw into question" the peonage statute which common sense suggests was far out of the minds of the members of the Wisconsin Supreme Court; the statute is never mentioned either directly or by even the most imaginative implication.

II. THIS COURT DOES NOT HAVE APPELLATE JURISDICTION OF THIS CASE UNDER 28 U.S.C. SEC. 1257(2) (1966).

A. Appellant's Jurisdictional Claim Might Have Been Alleged Under 28 U.S.C. Sec. 1257(2) (1966).

As Mr. Whittemore, an inmate, is arguing his case pro se, his jurisdictional allegations should be liberally construed. The only remaining provision for the appellate jurisdiction of this Court is 28 U.S.C. sec. 1257(2) (1966).

B. But The Challenged Jury Instruction Is Not A "State Statute" The Validity Of Which Was Brought Into Question.

In order to invoke the Supreme Court's jurisdiction on an appeal as of right under 28 U.S.C. sec. 1257(2) (1966), appellant must present both a substantial federal question, and a question arising from the highest state court's upholding a state statute as valid.

In this case, the Wisconsin Supreme Court upheld appellant's criminal conviction by a jury which had been given a particular jury instruction on the element of intent. A jury instruction is not a statute.

The Court has been broad in its interpretation of what counts as a state statute for purposes of defining its appellate jurisdiction. In Atlantic Coast Line R. Co. v. Goldsboro, 232 U.S. 548 (1914), the Court concluded: "And any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state." 232 U.S. at 555.

A jury instruction is at most an interpretation of the case law which in turn derives from the basic statute. In DeBacker v. Brainard, 396 U.S. 28 (1969), this Court concluded that a challenged exercise of a prosecutor's discretion was not "uncontrolled" by virtue of the statute under which the prosecution proceeded, but by virtue of the state case law (396 U.S. at 32, n. 6). Thus case law interpreting a statute was distinguished from the statute which generated it.

By implication, the Court has suggested that the issue of exactly the sort of jury instruction challenged in this case is properly considered by writ of certiorari. The question of the retroactivity of a decision invalidating a North Carolina jury instruction which shifted the burden of proof on interest to the

defendant (the same shift which appellant contends the Wisconsin instruction accomplishes) was, in Hankerson v. North Carolina, 432 U.S. 233 (1977), taken by this Court by writ of certiorari, not by appeal.

CONCLUSION

Mr. Whittemore's appeal does not fall under either the two categories of appellate jurisdiction of the United States Supreme Court, and therefore should be dismissed.

Respectfully submitted,

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